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No. 71-723

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

Adult Book Store, et al.,
Petitioners,

— vs —

M. E. SENSENBRENNER, Mayor,
Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of the State of Ohio

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BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

TO: The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent prays that a Writ of Certiorari to review the Judgment of the Ohio Supreme Court be denied because the Judgment represents a correct application of the requirements of the First Amendment of the United States Constitution to the narrow fact situation presented by this case.

OPINIONS BELOW

The citations of opinions delivered in the Courts below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Does the constitutional standards established by the United States Supreme Court protect the 127 magazines in question from state regulation which seeks to control their sale and distribution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution and Sections 2905.34 and 2905.343 of the Ohio Revised Code are adequately set forth in the Petition.

STATEMENT OF THE CASE

On June 4, 1970, the Respondent, M. E. Sensenbrenner, in his capacity as Mayor and chief executive officer of the City of Columbus filed an amended petition to enjoin the sale and distribution of 127 alledgedly obscene magazines pursuant to Section 2905.343 of the Ohio Revised Code. The Petitioners having duly answered, the case came on for trial on the merits before Judge Charles Petree, Judge Franklin County Court of Common Pleas on June 16, 1971. Expert witnesses appeared on behalf of both the Petitioners and Respondent to testify as to their opinion of the obscenity of the magazines in question. On August 3, 1970, Judge Petree rendered a decision (a copy of which is attached to the Petitioners' Brief) finding all 127 magazines obscene and issued a permanent injunction enjoining their sale and distribution within the City of Columbus, Ohio.

The decision of the Franklin County Court of Common Pleas was affirmed on March 2, 1971, by the Court

of Appeals of Franklin County, Ohio. On September 15, 1971, the Ohio Supreme Court denied the Petitioners application for leave to appeal for the reason that no substantial constitutional question exists.

ARGUMENT

The Petitioners have requested this Court to exercise its certiorari jurisdiction on the narrow basis that by reason of the constitutional guidelines provided by the United States Supreme Court since its decision in the *Roth*[1] case the 127 magazines at issue are non-obscene as a matter of law and as such protected by the First Amendment to the United States Constitution. Neither Ohio's statutory definition of obscenity[2] or its method of controlling obscene materials by enjoining their sale and distribution[3] are presently under attack as being in conflict with the First Amendment. The Petitioners merely argue that materials which are similar in kind to the magazines in question have been found non-obscene by this Court and if the decision of the Ohio Supreme Court is not reversed, the State of Ohio will be controlled by different standards of First Amendment protection than the rest of the country.

From an analysis of the decisions of both trial court and the Franklin County Court of Appeals which was affirmed by the Ohio Supreme Court it is clear that both courts were careful to point out in their respective judgments that all the magazines in questions were found to be obscene in accordance with constitutional guidelines

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[1] *Roth v. United States*, 354 U. S. 476

[2] Ohio Revised Code, Section 2905.34

[3] Ohio Revised Code, Section 2905.343

established by the Supreme Court in the *Memoirs*[4] case. While the Petitioners are attempting to portray the magazines at issue as those of the nudist colony type, a review of materials enjoined demonstrates that many of the photographs show men and women in lewd and enticing positions depicting the complete range of vulgar and unusual types of sexual activity. It is submitted the United States Supreme Court has never stated that the states are without authority to control the sale and distribution of this type of material.

The recent decision of the Supreme Court in *United States v. Reidel*, 28 L. Ed. 813 has done much to clarify the authority of the states to control the sale and distribution of obscene material within their respective jurisdictions. In the *Reidel*[5] case this Court not only reaffirmed the *Roth*[6] decision that obscenity is not within the area of constitutionally protected free speech or press, but expressly limited its 1969 decision in *Stanley v. Georgia*, 394 U. S. 557 to the facts of that case. While stating that private possession of obscenity cannot be made a crime, this Court again re-emphasized its position which it had taken in the *Stanley*[7] case, that the states retain broad powers to regulate the sale and distribution of obscenity. Justice White, in delivering the opinion for the Court, while recognizing the view point that adults should have complete freedom to produce, distribute and sell any materials which may appeal to

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[4] *Memoirs v. Massachusetts*, 383 U. S. 413

[5] *United States v. Reidel*, 28 L. Ed. 813

[6] *Roth v. United States*, 354 U. S. 476

[7] *Stanley v. Georgia*, 394 U. S. 557

them, made it very clear that the task of amending and repealing obscenity statutes lies with the state legislatures and not with the Supreme Court.

It is submitted by the Respondent that since the Petitioners have decided not to challenge the constitutionality of the Ohio Obscenity Laws, but only to contest their particular application to the 127 magazines in question, no important question relating to the First Amendment right to freedom of speech and press requiring review by this Court has been raised.

CONCLUSION

For the reasons set forth hereinabove, the Petition should be denied.

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